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Supreme Court of the United States

OCTOBER TERM—1958

No. 388

PROGRESSIVE BUILDERS, INC.,
Petitioner,

—against—

DISTRICT OF COLUMBIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Progressive Builders, Inc., respectfully presents its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Opinions

The opinion of the United States Court of Appeals for the District of Columbia Circuit, is annexed hereto as Appendix "A", and has not yet been reported.

The opinion of the United States District Court for the District of Columbia, is included in the record filed with this petition and has not been reported.

Jurisdiction

The judgment of the United States Court of Appeals sought to be reviewed was dated and entered on June 26, 1958. A copy of the judgment is annexed hereto as Appendix "B".

The jurisdiction of this Court is invoked under the Act of Congress of June 25, 1948, Chapter 646, Sec. 1, 62 Stat. 928, 28 U. S. C. Sec. 1254(1), providing for review by this Court of decisions of United States Courts of Appeals by writ of certiorari.

Questions Presented for Review

1. Should not the decision of this Court in *United States v. Blair*, 321 U. S. 730 (1944) be reconsidered and overruled by this Court upon consideration of matters not presented, argued or determined in that case with respect to the statutory limitation of administrative authority to review unliquidated claims for breach of contract and with respect to distinctions between claims arising "under" the contract and *dehors* the contract, particularly since subsequent to such decision, administrative agencies have continued to refuse to entertain such claims on the ground of lack of statutory authority and since other courts, notwithstanding the *Blair* decision, have continued to hold such claims administratively unappealable.

2. Under the standard form of government contract requiring appeals to heads of departments relating to questions arising "under" the contract, is such an appeal required concerning an unliquidated claim for damages for breach of contract prior to and as a condition precedent to institution of suit for such breach?

3. Do the Acts of Congress (U. S. C. Title 31, Sec. 665 (1) and Title 41, Secs. 11 and 12) authorize the review by United States administrative agencies of claims for unliquidated damages for breach of contract?

4. Under the standard form of District of Columbia construction contract providing for an appeal to the Commissioners of the District of Columbia from decisions of the contracting officer and under the District of Columbia Code (Title 1, Sections 902 and 904) which limits the authority of the Commissioners to settle claims not in excess of $10,000.00, is such an administrative appeal required prior to and as a condition to the institution of a suit for breach of contract where the claim is in excess of said sum?

5. Under the standard form of government construction contract requiring the contractor to give notice of causes of delay within ten days of the commencement of the delay in order to obtain an extension of time for excusable causes, is such notice required where the cause of delay is a breach of contract by the Government?

6. Where a Government contract calls for the construction of two separate and severable units and provides for liquidated damages for failure to complete the entire contract within the contract time without provision for apportioning liquidated damages to the separate units, may any liquidated damages be imposed where one of the units is completed within the contract time and immediately put into use?

7. Where a contractor under a Government construction contract attempts to perform tests required by the contract, which are found to be impossible of accomplishment because of the defective design furnished by the Government, may the contractor be held solely responsible for delays during the period while he is attempting to perform such tests?

8. Where the completion of the contract is delayed by the inability to perform such tests due to the defective design, may liquidated damages for delays be imposed because the contractor did not give notice of such cause of delay within ten days of the commencement of the attempt to perform

such tests, under the requirements of the standard form of Government contract delay-damages clause, or is such notice excused by reason of the proper assumption by the contractor that the tests could be accomplished under the contract design and his continued attempts to perform the same?

9. Where during the performance of such tests, a dangerous condition develops and the contractor gives notice thereof in writing to the contracting officer within ten days of the discovery of such dangerous condition and is directed by the contracting officer to perform work beyond the contract requirements in order to accomplish the tests, and the contractor also gives notice in writing within ten days of such direction that it would make claim for damages and delays by reason thereof, may the contractor be denied an extension of time and the remission of liquidated damages imposed for the periods subsequent to such written notices for the reason that such notices did not request an extension of time, such request having been made upon the completion of the contract?

10. Where extra work is ordered during the performance of a Government construction contract which cannot be completed prior to the contract completion date by reason of the inability to obtain necessary materials of which there is a shortage, is the contractor not entitled to an extension of time for completion of the entire contract until the completion of the extra work and may any liquidated damages be imposed for any period prior to date of such completion?

Statutes Involved

Pertinent text of the following statutes herein involved are set forth in Appendix "B" hereto.

1. Act of Congress, U. S. C. Title 31, Sec. 665 (d); R.S. Sec. 3679; March 3, 1905, c. 1484, Sec. 1, 33 Stat. 1257;

amended Feb. 27, 1906, c. 510, Sec. 3, 34 Stat. 48; amended Sept. 6, 1950, c. 896; subchap. VII, Sec. 1211, 64 Stat. 765; amended August 1, 1956, c. 814, Sec. 3; 70 Stat. 784; amended Aug. 28, 1957, P.L. 85-170, subc. XIV, Sec. 1401; 71 Stat. 440.

2. Act of Congress, U. S. C. Title 31, Sec. 71; R.S. Sec. 236, June 10, 1921, c. 8, Sec. 305, 42 Stat. 24.

3. Act of Congress, U. S. C. Title 41, Sec. 11; R.S. Sec. 3732; June 12, 1906, c. 3078, 34 Stat. 255.

4. Act of Congress, U. S. C. Title 41, Sec. 12; R.S. Sec. 3733.

5. District of Columbia Code, Title 47, Sec. 105 (1951 Ed.); Act of June 26, 1912, 37 Stat. 184, c. 182, Sec. 9.

6. District of Columbia Code, Title 1, Sec. 902 and Sec. 904 (1951 Ed.); Act of Feb. 11, 1929, 45 Stat. 1160, c. 173, Sec. 1; Act of June 5, 1930, 46 Stat. 500, c. 400.

Statement of the Case

Petitioner was a contractor with the District of Columbia for the construction of certain additions to the existing Blue Plains Sewage Treatment Plant in the District.

Petitioner brought suit in the United States District Court for the District of Columbia on the following causes of action: (1) for recovery of the sum of $30,606.00 imposed by the District for liquidated damages for delays; (2) for damages for breach of contract in the sum of $100,282.35 in performing work not required by the contract; and (3) for $6,620.00 for extra concrete work ordered.

The trial court denied recovery on the first and second causes of action and granted judgment in favor of the petitioner on the third cause of action. Appeals were taken

by both the petitioner and respondent. The United States Court of Appeals affirmed on all causes of action. This petition involves only the claims on the first and second causes of action.

The First Cause of Action

The contract required the construction of two separate and distinct units: Unit 2A consisting of four sedimentation tanks added to the existing sedimentation facilities and Unit 4A consisting of four sludge digestion tanks (App. pp. 25a, 37a, 41a, 83a). The contract provided for liquidated damages of $100. per day for failure to complete within the contract time as extended. There was no apportionment of the damages between Units 2A and 4A provided for in the contract (App. pp. 29a, 41a, 42a). The extended completion date was May 3, 1951 (App. pp. 25a, 29a, 41a). Unit 2A was completed prior to that time and was put into immediate use (App. pp. 64a, 66a). Unit 4A was not completed until March 4, 1952. Liquidated damages for 306 days at $100. per day in the sum of $30,600.00 were imposed for the period from May 3, 1951 to March 4, 1952 (App. pp. 25a, 27a).

The trial court found that the delay for the period from May 3, 1951 to August 22, 1951 was due solely to the fault of the petitioner (App. pp. 28a, 38a). The trial court also found that the delay from August 23, 1951 to March 1952 was due to the fault of both the petitioner and the respondent, but primarily due to the fact that the respondent imposed unreasonable requirements with respect to tests to be performed by the petitioner and required the petitioner to perform work not called for by the terms of the contract and that for such period of time, or a total of 195 days, the petitioner would be entitled to recover the retained liquidated damages except for petitioner's failure to meet the contract requirements relative to extensions of time (App. pp. 28a-29a, 38a).

With reference to Unit 4A, which was not completed on time, the contract called for a test of gas domes on top of the tanks by filling the tanks so as to cause a column of water to rise inside the gas domes for testing it for leakage of air (App. pp. 29a, 46a, 87a). The trial court found this test was impossible of accomplishment under the contract design by reason of the fact that the tanks were not designed to be water tight and they therefore could not be filled with water (App. pp. 29a, 38a, 56a). Petitioner commenced attempts to make this test in April 1951, by attempting to fill the tanks and continued such attempts until September 18, 1951 when the passage of water in large quantity from one tank to the other indicated that a dangerous condition might result by the continued effort to fill the tanks in that it might cause a wash out of the materials supporting the tanks (App. pp. 49a, 60a, 61a, 62a, 63a).

Within three days of ascertaining the dangerous condition, and on September 21, 1957, petitioner notified the contracting officer in writing and asked for instructions (App. pp. 49a-50a). This was followed by a meeting on October 2, 1951, at which time the contracting officer ordered work beyond contract requirements in the sum of $45,649.57, in order to accomplish the tests as found by the trial court (App. pp. 29a-30a, 34a, 50a, 51a, 62a). On October 9, 1951, and within ten days after such work was ordered, petitioner wrote to the Contracting Officer advising him that it was proceeding under protest and would make claim for damages and delays (App. pp. 34a, 51a, 62a). During the period from May 31, 1951 to August 22, 1951 for which the trial court held petitioner responsible for delays, petitioner was attempting to comply with the tests which the trial court found was impossible of accomplishment under the contract design (App. pp. 49a, 60a, 61a, 62a, 63a).

Prior to the completion date certain extra electrical work was ordered which could not be performed until the approximate completion of the entire contract by reason of shortage

of materials necessary for the performance of such extra work, although the District conceded this work was expeditiously performed and was completed in March, 1952 (App. pp. 60a, 61a, 68a, 81a).

Upon completion of the contract, petitioner applied for an extension of time to the date of completion of all the work. The extension was denied (App. pp. 34a, 35a, 54a).

Pursuant to Article 15 of the contract, petitioner appealed to the Commissioners of the District of Columbia from the ruling denying the extension of time (App. pp. 35a, 55a). Petitioner also performed certain extra concrete work for which the trial court found petitioner was entitled to recover. This also had been denied by the Contracting Officer and timely appeal was taken to the Commissioners of the District of Columbia (App. pp. 35a, 55a). These appeals, however, were not brought on for hearing before the commencement of suit, in spite of several requests therefor for a period of more than 2 years after the appeals were taken (App. pp. 35a, 55a). The trial court allowed recovery on the third cause of action for the extra concrete work although the appeal thereon had not been heard. The necessary inference is that the trial court found the appeal procedure under the contract was futile in view of the long delay in entertaining the appeal.

The United States Court of Appeals affirmed the decision of the trial court and held that petitioner could not recover for the delay from August 23, 1951 to March 4, 1952 (for which the respondent was responsible) for the reason that no written notice of the cause of the delay was given by the petitioner within ten days from the commencement of such delay as required by Article 9 of the contract although written notice was given within 10 days of the dangerous condition becoming apparent and within 10 days of being ordered to perform work beyond contract requirements to correct such condition (App. pp. 49a-50a, 34a, 51a, 62a).

The decision of the Court of Appeals is in conflict with decisions of the United States Court of Claims and administrative agencies which hold that no notice is required where the delay results from breach of contract on the part of the owner

The failure of the respondent to furnish a design under which the tests could be accomplished and the requirement to perform as contract work, work beyond contract requirements constituted such a breach of contract.

The owner represents the plans and specifications will produce the result. If they do not produce the result, it is the fault of the owner and not that of the contractor.

U. S. v. Spearin, 248 U. S. 132 (1918);

Morrison-Knudsen v. U. S., 113 C. Cls. 536.

Notice within ten days of direction to perform work beyond contract requirements is adequate notice of delay

The trial court found that the first date contractor was definitely advised it would be required to perform work beyond contract requirements was oral directions by the Contracting Officer at a meeting on October 2, 1951 (additional Finding 5) (App. pp. 34a, 52a); that within ten days thereafter, contractor did protest such ruling and state that it would make claim therefore and would be delayed (additional Finding 6) (App. pp. 34a, 51a, 62a); that such protest was by contractor's letter of October 9, 1951 (Additional Finding 7) (App. p. 34a).

Said letter expressly stated "* * * this work will be performed only under protest and that we will make claim for the extra expense and delays * * *" (App. p. 51a).

Certainly, therefore, written notice within ten days of the commencement of delay, insofar as it resulted from the requirement to do this protested work, was given. Contractor,

would therefore, be entitled to recover the liquidated damages from October 2, 1951 to March 4, 1952, a period of 155 days at $100.00 per day or $15,500.

Notice of commencement of delay should not be required where the contractor is unaware of defects in plans causing delay

The gas dome tests and the manner of performance thereof were specified in minute detail (App. p. 46a). When petitioner started to perform those tests in April 1951, it had a right to assume they could be accomplished under the design and it was justified in attempting repeatedly to accomplish them; it is not required to be more omniscient than the experts employed by the owner to prepare those plans and specifications; it is not to be condemned for persistently attempting to procure the results sought by the methods indicated in its contract and by the means supplied exclusively by the owner—in this instance the water available for filling the tanks (App. p. 47a).

We submit that it is utterly impractical and unjust to penalize the petitioner for failure to give a notice of delay within ten days of the commencement thereof where he has no reason to believe the delay results from defects in design which were not apparent to him.

To require a written notice of delay under those circumstances is utterly impractical and unreasonable, and the Courts will not require it.

In *Hoysch* v. *U. S.*, 94 C. Cls. 602, 638 (1941), contractor was required, by the usual government Contract Article 4, to give notice to the Contracting Officer in order to recover additional costs resulting from subsurface conditions different from what might be normally expected, and such notice was required to be given before the condition was disturbed. The contractor, not realizing the condition was unusual until subsequent work failed by reason thereof, was nevertheless

permitted to recover though no notice was given as required by the contract. The Court there stated:

> "These articles must be interpreted and applied in the light of the facts and circumstances as shown by the record in each case."

Contracts should be reasonably construed to require notice only when plaintiff might acquire knowledge that the condition is of such nature as to require notice under the contract. The Courts as indicated by *Hirsch* v. *U. S.* (*supra*), have followed such a rule of reasonable interpretation.

No notice of delay is required where caused by breaches of the Government

A delay, resulting from breach of contract or from acts of the Contracting Officer, himself, entitles the contractor to an extension of time to complete although no notice of such delay is given within ten days from the commencement thereof.

In *Hirsch* v. *U. S.*, 94 C. Cls. 602, 632-634 (Nov. 1941), the government delayed in preparing the site, in furnishing drawings and in issuing stop orders. Liquidated damages were imposed, contractor having failed to give ten days notice pursuant to Contract Article 9.

The Court held in allowing recovery to the contractor:

> "The proviso in Article 9 of the contract that the contractor should give the contracting officer written notices of the causes of delay within ten days from the beginning thereof has reference, we think, to matters which result in delay in prosecution of the work of which the Contracting Officer did not and probably would not have otherwise knowledge, such as rulings, instructions and requirements of inspectors or constructing engineers of the defendant. * * * It would

be an unreasonable interpretation of Article 9 to hold that after the contracting officer had ordered plaintiff to proceed the contractor should be charged with heavy damages if he did not notify the contracting officer in writing to fulfill his (contracting officer's) specific promises and comply with his own obligation under the contracts.

"The defendant having unreasonably delayed plaintiff, the liquidated damage clauses of the contracts were thereby waived. F. S. v. United Engineering & Contracting Co., 234 U. S. 236, 242; Ittner v. U. S., 43 C. Cls. 336, 351; Greeley Iron Works v. U. S., 66 C. Cls. 328, 333; Griffiths v. U. S., 77 C. Cls. 542, 550, 551; Wharton Green & Co. Inc. v. U. S., 86, C. Cls. 100."

In *Langevin* v. *U. S.*, 100 C. Cls. 45 (1943), pending instructions concerning proposed changes, the work was suspended but no notice of delay within ten days was given as required by Contract Article 9. Contractor nevertheless recovered the liquidated damages assessed. The Court held on page 39:

"There is no conceivable reason why this extension should not have been granted. It was a delay caused in part by latent subsurface conditions and in part by the failure of the defendant's representatives to act promptly."

On page 34, the Court stated:

"We have found that plaintiff is entitled to recover for defendant's delay in notifying him of the depth to which it wanted the footings lowered; although plaintiff did not notify the contracting officer of this delay, because this was a matter within the knowledge of the contracting officer, and hence, notification was unnecessary."

Executive agencies, administering contracts, hold similarly.

In *Modern Engineering Co. BCA No. 684* (Jan. 1945), 3 CCF 360, 370, the government delayed deliveries of machinery. Contractor failed to give the ten day notice. The board held in favor of the appellant and stated:

> "This conduct of the Government, in the opinion of the Board was a breach of a fundamental provision of the contract which should not be regarded as an excusable cause of delay under Article 5 of the contract, requiring a ten day written notice to the Contracting Officer to avail appellant."

See also,

Appeal of C. H. Rogers Electric Co., B.C.A. No. 197 1 CCF 841;

Woodbury Mfg. Co., ASBCA No. 292 (June 1950), 4 CCF 51593.

The precise question is here raised in this Court for the first time. All decisions passing on this precise question, hold no notice within ten days of the commencement of delays is required where breach of contract of the owner has caused the delay. This is particularly so where the act causing the breach is within the knowledge of the Contracting Officer or his duly authorized representative, and the service of notice on one already having notice, is mere futile form.

The decision of the Court of Appeals in our case conflicts with the unanimity of decisions in other courts on this point.

The Court of Appeals affirmed on the authority of its own decision in *United States v. Cunningham*, 125 F. 2d 28 (D.C. Cir. 1941). In the *Cunningham* case, the question as to whether notice was required for delays resulting from breach of contract was not raised. The sole question there was: Assuming that written notice was required, was the writing

waived by oral notice to which no objection was taken? If it be assumed that the *Cunningham* case is authority for the rule that in cases of breaches of contract, notice of delay is required, then such decision, like the instant one, is in conflict with the decisions in the United States Court of Claims and Administrative Agencies above cited.

The requirement for notice of delay in order to obtain an extension of time does not require the request for extension be made within ten days of commencement of delay

The trial court apparently construed the provisions in Article 9 with respect to giving within ten days notice of the causes of delay as meaning that an application for extension of time must be made within that time. The trial court noted that the extension of time was applied for after the work was completed but held that such application did not comply with the contract provision (App. p. 29a).

The Court of Appeals apparently adopted that construction. However, Article 9 merely requires that notice of causes of delay be given within ten days and nowhere does it state that application must be made for an extension of time within such time. Article 9 provides that the contractor shall not be charged with liquidated damages "if the contractor shall within ten (10) days from the beginning of any such delay notify the contracting officer in writing of the causes of delay." The construction given to the contract provision was therefore erroneous.

Such construction of the contract provision is in conflict with decisions of other courts and administrative agencies. We know of no decision expressly holding that notice of application for an extension of time must be made within that time.

Liquidated damages may not be imposed where applicable to severable portions of the work without provision for apportionment and some of the severable items are finished on time

The Court of Appeals rejected the contention of the petitioner that no liquidated damages may be imposed where there is no apportionment provided in the contract for liquidated damages separately with respect to Units 2A and 4A. The Court of Appeals stated that the work was divided into two units, yet it held that the contract was not severable or one in which the liquidated damages must be apportioned to the severable parts, and the Court of Appeals held that the damages of $100. a day as to each unit would not be unreasonable.

Where severable, separate units of construction are involved and liquidated damages are imposed by the contract for failure to complete the entire contract, such damages may not be imposed where the contract does not provide for apportionment of the liquidated damages between the separate units, where one of such separate units is completed on time and put into use. Under such circumstances the owner would be relegated to proof of actual damages relative to the uncompleted portion of the work. The sum fixed for liquidated damages relating to the entire contract is the sum which the parties believe to be reasonable *as of the time of the making of the contract* for failure to complete the entire contract. Where one portion severably usable is completed then the right to impose liquidated damages no longer applies.

The decision of the Court of Appeals is in conflict with decisions of other courts applying the rule of law as above stated.

Provisions for liquidated damages should be narrowly construed.

Climatic Rainwear Co. v. *U. S.*, 115 C. Cls. 520, 558;

Tobin v. *U. S.*, 103 C. Cls. 480, 492.

Liquidated damages are not enforced if there is an excessive disproportion between the actual and stipulated damage. The test as to such disproportion is determined as of the time of making the contract, not as of the time of breach.

Piriebe & Sons v. U. S., 332 U. S. 407 (1947).

A damage of $100.00 per day, made applicable at the time of making the contract to the delay of the entire contract, is obviously disproportionate when applied to a severable half of the entire contract.

In *Bedford v. J. Henry Miller Inc.*, 212 F. 368 (1914), plaintiff was a subcontractor of defendant prime contractor with the Government. The subcontract provided for liquidated damages of $50. per day for delay to cover damages which might be imposed on defendant by the Government and additional damages which defendant might sustain by reason of delay. The Government having waived its claim for damages, liquidated damages were not permitted to be imposed on plaintiff. The Appellate Court held the liquidated damage provision was intended to cover two factors—the damages imposed upon defendant by the Government and the other damages sustained by defendant; that the two factors added together were agreed upon as valued at $50. per day; that one factor having fallen out, the other alone cannot represent the damage intended to be the sum of both.

So in our case, the damage of $100. per day represented two factors, Unit 2A and Unit 4A. Unit 2A having fallen out, Unit 4A alone cannot represent the damage intended to be the sum of 2A and 4A.

In *U. S. v. Manufacturers Casualty Insurance Co.*, 113 F.S. 402 (1953) it is stated:

> "Even if only one of the factors of loss to cover which a provision for liquidated damages has been made is eliminated liquidated damages cannot be recovered."

In *Rogers T/A O. H. Rogers Electric Co. BCA No. 197*, 1 CCF 841 (1943), the Board of Contract of Appeals stated:

> "The authorities agree and the Courts have generally held that the essential element of an enforceable agreement for liquidated damages, made prior to default, is that the amount be forecast or estimated on the basis of just compensation for the harm that will be caused by the default * * *." (p. 844)
>
> "The harm contemplated by these contracts was the deprivation of the full use of the objects of the contracts, which would result from delay in performance of work. The validity of the liquidated damages as a reasonable forecast of just compensation rests upon that basis." (p. 845)

The respondent made no attempt to prove actual damages. Under the circumstances here disclosed, liquidated damages are not chargeable. Questions as to notice within ten days of commencement of delay have no bearing on this point. Such notice could have application solely to the right of extension of time relative to the incomplete portion of the contract. A substantial useable portion of the contract having been completed, the imposition of the full damage to the remaining work became a penalty.

Since no liquidated damages may be imposed where the contract does not provide for apportionment to separate units, the court may not determine whether the amount specified for liquidated damages for failure to perform the entire contract is reasonable when applied only to a severable part thereof.

Where extra work is ordered requiring performance beyond the completion date, the contractor is entitled to an extension of time of the entire contract pending completion of the extra work

In any event, no liquidated damages could have been properly imposed against petitioner since conceded extra electrical work was ordered during the performance of the contract which could not have been completed within the contract time because of the shortage of necessary materials. The Court of Appeals made no express ruling upon this contention of the petitioner and it may be deemed that such contention was rejected. Such decision of the Court of Appeals is in conflict with decisions of other courts declaring the rule that where extra work is ordered, the same becomes part of the contract and the contractor is entitled to an extension of time for the performance of the contract until the completion of the extra work.

Where the performance of extra work, whether ordered prior or subsequent to the contract completion date, requires performance subsequent to the completion date, the contractor is entitled to an extension of time applicable to the entire contract for such period as is reasonably required for the completion of the extra work.

In *U. S.* v. *United Engineering and Contracting Co.*, 234 U. S. 236, 34 S. Ct. 843 (1914), extra work was ordered subsequent to the completion date. The government attempted to apportion the time necessary for performance of the extra work and charge liquidated damages for delay relative to the contract work. In denying liquidated damages, the Court stated (pp. 241-242):

> "The precise question here is whether, when the work was delayed solely because of the Government's fault beyond the time fixed for its completion and afterwards the work was completed without any definite time being fixed in which it was to be done, the claimant can be charged for the subsequent delays for which

> he was at fault by the rule of the original contract stipulating liquidated damages, or was that stipulation waived, by the conduct of the Government and was it obligatory upon it in order to recover for the subsequent delays to show the actual damages sustained. We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages • • • in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time, and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived."

The Board of Contract Appeals, in the case of *N. P. Serrin Co.*, 2 CCF 782, 784 (1944), referred to the above decision and consequently denied the Government's apportionment of the delays between the parties. The board also cited *U. S. v. Kantor, et al.*, 137 F. 2d 828, 830 (1943) in which the Court reiterated the rule and in referring to the decision of the Supreme Court (*U. S. v. United Engineering & Contracting Co., supra*), stated:

> "• • • But it is also established that where one seeking to enforce a provision for liquidated damages is responsible for the failure of performance, or has contributed in part to it, the provision will not be enforced. Where both parties are in default, the Courts will not attempt to apportion the delay due to each part in the absence of a contract provision requiring such apportionment. U. S. v. Engineering & Const. Co., 234 U. S. 236, 242, 243, 34 S. Ct. 843, 58 L. Ed. 1294; American Engineering Co. v. U. S., D. C., 24 F. Supp. 449, 551."

Similarly, in *U. S.* (for the Use of Guillioz) v. *John Kerns Co. et al.*, 140 F. 2d 792, 795, 50 F. Supp. 692 (1943) which involved changes in plans and specifications which were issued subsequent to the completion date, the Government attempted to apportion the extra work and assess liquidated damages for the remaining portion. The Court of Appeals in denying an apportionment stated:

> "The law is universally recognized, that where a party to a contract agrees to a day certain and in default to pay a sum of money as liquidated damages, if the other party to the contract engages in conduct which prevents the doing of the thing contracted for in the specified time, such action amounts to a waiver of the claim for liquidated damages for delays."

In our case, petitioner was refused an extension of time by reason of delay resulting from the requirement to perform the extra work. Petitioner protested the denial (App. 54a) and appealed to the District Commissioners (App. 55a). The Commissioners having failed to entertain the appeal for over two years, in spite of written requests to do so, the appeal procedure was considered futile and this action instituted (App. 55a).

It was conceded that in denying petitioner's request for extension of time, no consideration was given to the difficulties in obtaining materials for the extra work and the delays resulting therefrom (App. 81a).

In *Needles* v. *U. S.*, 101 C. Cls. 535, 603 (1944), it is stated:

> "A decision or finding may be held to be arbitrary when existing important facts, conditions and express contract provisions should obviously have been considered and given due and proper weight, but were not."

The Second Cause of Action

The trial court found that the petitioner was put to additional expense for labor and materials in the performance of work beyond the requirements of the contract in the sum of $45,649.57. Recovery was denied, however, for the reason that no appeal was taken under Article 15 (Disputes Clause) of the contract to the Commissioners of the District of Columbia on the claim for such work. The trial court held that petitioner was barred from recovery under *United States* v. *Blair*, 321 U. S. 730 (1944) and *United States* v. *Cunningham*, 75 U. S. App. D. C. 95, 125 F. 2d 28. The Court of Appeals affirmed upon the authority of the *Blair* case.

This Court in the *Blair* case held, by a divided court, that unliquidated damage claims are required to be administratively appealed and the failure to so appeal bars recovery in an action in the courts, unless the appeal procedure is found to be futile. However, in the *Blair* case, the following questions were not presented, argued or determined:

(a) A claim for damages for breach of contract is not "under" the contract but is *dehors* the contract. Article 15 of the standard form of government contract, and the contract with the District of Columbia in the instant case, requires appeals concerning questions arising "under" the contract. The contract provision is as follows:

> "Except as otherwise specifically provided in this contract, all disputes concerning questions arising *under* this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Commissioners, whose decision shall be final and conclusive upon the parties thereto." (Italics ours.)

Except for the case of *United States* v. *Blair*, 321 U. S. 730 (1944), which will be hereinafter discussed, it has been consistently held, *prior and subsequent to the Blair decision*, both under the quoted appeal provision and under similar provisions limiting the disputes article to "questions of fact," that claims for damages for breach of contract are unliquidated claims, not subject to the "disputes" provisions.

Claims for breach of contract are dehors the contract. The appeal provision is limited to claims under the contract

Claims for breach of contract are *dehors* the contract and not "under" the contract. The allowances thereof are beyond the authority of the Contracting Officer or administrative appeal boards since they exceed the purpose for which sums are appropriated for performance of the contract.

That claims for breach of contract are not "under" the contract is well established.

In *United States* v. *Cunningham*, (75 U. S. Court of Appeals, D. C. 95), 125 F. 2d 28 (1941) the court referred to additional work as "outside the limits of the contract."

In *Borough Construction Co.* v. *City of New York*, 200 N. Y. 149, 93 N. E. 480 (1910), it was provided that the chief engineer would determine "all questions in relation to said work and the construction thereof, and he shall in all cases decide every question which may arise relative to the execution of this contract on the part of the said contractor, and his estimate and decision shall be final and conclusive upon said contractor."

The court held with reference to work performed under protest that the action, based upon breach of contract in requiring the performance of such work as contract work,

> "(It) is not brought, however, on the theory of recovering on or under the contract for such extra material and services, but is instituted and thus far has been sustained on the theory that the appellant unjustly required the respondent to furnish materials and do work not covered by its contract, and thereby committed a breach of the contract for which damages recovered by the value of such material and work may be recovered."

The New York Court of Appeals sustained this position

In *Faber v. City of New York*, 222 N. Y. 255, 261, 118 N. E. 609 (1918) where the contract made the Engineer the Arbiter of work done under the contract, the Court held:

> "These provisions do not have reference to such a claim as the present which is not for work under the contract, but for damages for its breach."

James V. Joy of the Judge Advocate General's Office writing on "The Disputes Clause in Government Contracts" 25 Fordham Law Review (1956) at 43 44 states:

> "Despite the broadness of coverage of the standard forms, there still remains certain claims which arise *in connection with* but not *under* the contract. These claims are generally denominated as being for breach of contract for 'unliquidated' damages. Boards of Contract Appeals lack jurisdiction to determine the liability of the government in such cases." (Emphasis in original.)

Applicable statutes do not permit administrative agencies to entertain claims for breach of contract

(b) The administrative procedure established by statute does not authorize the entertainment of unliquidated claims for breach of contract by administrative agencies.

By statute, administrative officers may apply funds appropriated only for the limited purposes for which such funds were appropriated; funds appropriated for performance of a contract, may not be applied toward payment of damage claims for breach of that contract.

Title 47 (District of Columbia Code, 1951 Ed.) Sec. 105 Act of June 26, 1912, 37 Stat. 184, c. 182 Sec. 9 provides as follows:

> "The provisions of Section 665 of Title 31 of the Code of Laws of the United States of America, known as the 'Anti-Deficiency Act,' are hereby extended and made

applicable in all respects to appropriations made for and expenditures of and to all of the officers and employees of the Government of the District of Columbia."

U. S. C. A. Title 31 Sec. 665 (Act of March 3, 1905, C. 1484, Sec. 4, 33 Stat. 1257; Feb. 27, 1906, C. 410, Sec 3, 34 Stat. 48; Sept. 6, 1950 C. 896 Subchap. VII, Sec. 1211, 64 Stat. 765) provides as follows:

"No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; or shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law."

It will be noted Title 31 Section 665 contains two prohibitions: (1) the imposing of an expenditure or obligation in excess of the appropriation and (2) the involving of the government in a contract or obligation—even within an appropriation for a purpose where such contract or obligation, for that purpose, has not been authorized by law.

Appropriations for the purpose of performing a contract in accordance with approved plans and specifications, may not be diverted for the purpose of paying damages for breach of contract in requiring performance beyond the approved plans and specifications.

In defining "Authorized by Law" the Attorney General said in 22 Op. Atty. Gen. 437 (1899):

"that unless authorized by Congress the head of a department has no power to adjust and pay claims for unliquidated damages, even when arising from the breach of a contract, except when such claims are for

> work and labor done or materials furnished under a contract silent as to price and the amount thereof unliquidated."

We have in our case a fixed and unit price contract so the foregoing exception would not apply.

Section 665, Title 34 is cross referenced to Sections 11 and 12 of Title 41 U.S.C.A., Section 11, Act of June 12, 1906, c. 3078, 24, Stat. 255, U.S.C.A. Title 41, Sec. 11 provides in substance that:

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment," etc.

Section 12, Act of July 25, 1868, c. 233, Sec. 3, 15, Stat. 177 U.S.C.A. Title 41, Sec. 12 provides:

> "No contract shall be entered into for the erection, repair nor furnishing of any public building, or for any public improvements which shall bind the government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

Here again, the statutes emphasize that the specific and limited purpose must be expressly authorized and that payment beyond that purpose may not be made.

Courts and administrative agencies both prior and subsequent to the Blair decision hold administrative agencies may not entertain claims for breach of contract

From time immemorial, *to the present day*, the Courts and Administrative Appeal Boards have continued to hold that Administrative Officials, except the Comptroller General, U.S.C.A. Title 31, Sec. 71 (Act of June 10, 1921, C. 18, Sec.

305, 42 Stat. 24) have no authority to pass upon unliquidated claims.

In *McKee* v. *U. S.*, 12 C. Cls. 504, 556 (1876), it is stated that appropriations are made for payment of services rendered, material furnished and benefits conferred, which may be foreseen and estimated for with some degre of accuracy and, unless specifically provided for in the appropriation, do not include authority to pay unestimated and unlimited amounts as damages for violated contracts.

In *Power* v. *U. S.*, 18 C. Cls. 263, 275 (1883), it is stated:

> "Claims for unliquidated damages require for their settlement the application of the qualities of judgment and discretion. They are frequently, perhaps generally, sustained by extraneous proof, having no relation to subjects of the contract, which are common to both parties, as for instance, proof concerning the number of horses and the number of wagons and the length of time that would have been required in performing a given amount of transportation. The results to be reached in such cases, can in just sense be called an account, and are not committed by law to the control and decision of Treasury Accounting Officers."

In *Dennis* v. *U. S.*, 20 C. Cls. 119, 121 (1885), it is stated:

> "Technically, all claims for money, due on contracts, where the exact amount payable is not thereby fixed, as in the case of goods purchased or work done without an agreed price, are claims for unliquidated damages. But they arise necessarily and of course from otherwise fulfilled and executed agreements and a settlement rarely requires giving more than the ordinary processes of accounting, the prices being readily determined by the vouchers and reports of the public officers incurring the expenses, or by other means within reach of the accounting officers who very properly take jurisdiction and pass upon such claims. * * *

> "But claims for unliquidated damages founded on neglect or breach of obligations contrary to the terms of a contract, and not necessarily arising therefrom, are of quite a different class. They must be sustained by extraneous proof, often involving a broad field of investigations and requiring the application of judgment and discretion upon the measure of damages and the weight of conflicting evidence."

More recent cases in the Court of Claims, since the *Blair* decision, are as follows:

In *Anthony P. Miller* v. *U. S.*, 111 C. Cls. 252, 330, 77 F. S. 209 (1948) the Court said:

> "The plaintiff is not barred from recovery on this item of its claim by the action of the Contracting Officer, affirmed on appeal to the Head of the Department, the Administrator of the United States Housing Authority, denying the plaintiff compensation for the delay. Articles 9 and 15 of the contract, quoted in Finding 6, do not give this power of decision to the Contracting Officer. His power under Article 9 is to determine whether liquidated damages shall be assessed against the contractor for late completion of his work, and not whether unliquidated damages shall be assessed against the Government, for its breach of an express or implied obligation under the contract. If a Contracting Officer should award such damages against the Government, the Comptroller General would not allow them to be paid, and contracting officers generally disclaim any power to award such damages or deny them. See B-W Construction Company v. The United States, 101 C. Cls. 748, 771. If we allow the adverse decision of the Contracting Officer to prevent us from considering such cases on their merits, we are reading Article 9 as giving the Contracting Officer the power to decide claims for damages for breach of contract against con-

> tractor, but no power to decide such claims in their favor. Such a reading would be unfair as well as irrational. What we have said applies also to the power given to the head of the Department in Article 15 of the Contract, to decide disputes on appeal. Langevin v. United States, 100 C. Cls. 15, 31."

It was further held:

> "Were this a matter over which the contracting officer or the Secretary of War (or his designated representative) had authority, we might agree with defendant's contentions. But the claim is one for unliquidated damages. Over such claims the executive departments decline to exercise jurisdiction on the ground they are not within their authority. * * * Since the contracting officer had no authority to decide a claim of this kind it was not necessary to appeal his decision." Railroad Waterproofing Corp. v. U. S., 137 F. Supp. 713.

In *Continental Illinois National Bank and Trust Co.* v. *U. S.*, 126 C. Cls. 631, 640, 115 F. Supp. 892, 897 (1953) it is stated:

> "The departments are authorized to spend money only for the purposes for which it is appropriated by Congress. Funds are not appropriated to pay damages for breaches of contracts."

Administrative Agencies continue to hold, in current decisions, that unliquidated claims are not subject to appeal to the head of the department.

> *Victory Salvage Co.* ASBCA No. 3797, Navy Appeals Panel November 27, 1956, 56-2 BCA 2883 (delivery of government material not in conformance with contract).

Parker-Shram Co. Interior Department Board of Appeals No. 71 - January 31, 1957, 57 - 1 BCA 3097 (delay by government in furnishing materials).

David J. Cronin, Inc. ASBCA No. 3178 May 24, 1957 (extensive redesign of the work causing additional cost and seeking compensation therefor.)

Paul Jarvis Inc. 1 BCA No. 115, July 19, 1957, 57-2 BCA 4394 (claim for compensation for increased costs resulting from violation by government of express or implied obligations of cooperation).

Amherst Steamship Corporation, ASBCA July 23, 1957, 57-2 BCA 4602-3 (value of work beyond contract requirements).

In *U. S. v. David Center*, 244 F. 2d 205 (U.S.C.A., Fifth Circuit May 1, 1957); the General Services Administration disallowed a claim for loss of profits on the ground that it was "in the nature of claims for unliquidated damages for breach of contract which may not be paid or adjusted under appropriations, in the absence of specific provision therefor in the appropriation."

In *Weardco Construction Corp.*, (Interior Dept. Board of Contract Appeals No. 14-06-200-3828, 57-2 BCA 4835, 4843) it was stated:

> "The Contracting Officer accordingly was right in concluding that, absent any ground for the allowance of additional compensation *under* the contract, the instant claim must be regarded as one for breach of contract which he did not have authority to consider or settle."

Emil P. Hendriks Co. Inc., 57 - 2 BCA 5160, 5177 (1957) is precisely in point. The Board of Contract Appeals stated:

> "Any claim which appellant may have on this account must rest upon the Government's failure to pro-

> vide adequate specifications and drawings. There is no provision in the confract which authorizes reimbursement for such failure. Recovery by appellant must be based upon damages for breach of the implied warranty that the plan submitted with the Contractor are adequate of U. S. v. Atlantic Dredging Co., 253 U. S. 1; U. S. v. Spearin, 248 U. S. 132; Stapleton Constr. Co. Inc. v. U. S., 92 C. Cls. 551; Railroad Waterproofing Corp. v. U. S. 137 F. S. 713 (1956).

Qualified experts currently express the view that contracting officers and appeals boards have no jurisdiction over unliquidated claims.

We have quoted above from Joy in 25 Fordham Law Review, 43-44 (1956) indicating distinctions relative to claims "in connection with" but not "under" the contract. In that article it is further stated:

> "The rule is often stated that a secretary may not determine or compromise general or unliquidated damages or damages for breach of contract."

E. Manning Seltzer, Chief Counsel of the legal division, Office of the Chief of Engineers and Abert M. Gross, Chief of the legal branch, North Atlantic Division, in an article in 25 Fordham Law Review, No. 3, page 425 to 426 (1956) states:

> "Any attempt to provide in a government contract without Congressional sanction, that damages for breach of contract will be determined and paid for by the Contracting Officer would be held unauthorized as a usurpation of the function of the Court of Claims * * *, to say nothing of the functions of the U. S. General Accounting Office. Thus, even though a government agent recognizes the government has breached its contract, he cannot adjust the matter."

Congress has granted to the Courts alone, the power to determine unliquidated claims except, as stated by Madden, *J.*, in *B-W Construction Co.* v. *U. S.*, 101 C. Cls. 748, 771, 60 F. S. 771 (1948):

> "The Comptroller-General whose powers are somewhat undefined and whose expenditures are, so far as the government is concerned, practically unreviewable; sometimes gives relief."

In *Clyde* v. *U. S.*, 80 U. S. 35, 39 (1871) the Court held that to require claimants to first submit their claims to the Department was "establishing a jurisdictional requirement which Congress alone had the power to establish."

In view of the continued determinations by the Court of Claims and the administrative agencies that such claims are not appealable, the *Blair* decision should be reviewed by this Court and the present confusing situation should be clarified and settled by this Court. At the present time, contractors are faced with a situation in which the administrative agencies hold that claims for damages for breach of contract are not reviewable and yet he may be faced with a dismissal of his claim for failing to appeal to such agencies.

The appeal procedure was futile

In the *Blair* case the Court stated (736):

> "There was no finding or evidence that appeal to the head of the appropriate department or to his authorized representative would have been futile or prejudiced * * * *"

> "If it were shown that the appeal procedure provided in the contract was in fact inadequate for the correction of the alleged unreasonable attitude of the subordinate government officials, we would have quite a different case."

Here we do have undisputed facts which indicate the appeal would have been futile. Petitioner had appealed from rulings disallowing extension of time by reason of the very requirement to perform the work improperly imposed on appellant (App. pp. 35a, 55a). Yet for over two years, and in spite of written requests therefor, no hearing was had (App. pp. 35a, 55a).

In *Southeastern Oil Florida Inc. v. U. S.*, 115 F. Supp. 198, 129 C. Cls. 40 (1953), the Board of Contract Appeals, having failed to rule on a motion to dismiss an appeal for two years, plaintiff sued in the Court of Claims. Thereafter, the Board of Appeals denied the motion and indicated it would entertain the appeal, which plaintiff then refused to proceed with. The government defended on the ground plaintiff had not exhausted the administrative remedy of appeal. It was held:

> "In this case, the plaintiff having appealed to the head of department and the head of the department having failed for more than two years to indicate whether he would or would not entertain the appeal, the plaintiff was justified in regarding the administrative appeal procedure as inadequate and in filing its suit in this Court. Having filed its suit, it was not required to abandon that suit and resume the administrative procedure."

In *Wessel Duval Co. v. U. S.*, 126 F.S. 79 (S. D. N. Y. 1954) it was stated the court would adopt the "rule of thumb" that the administrative procedure is inadequate so as to entitle relief in the Courts where a determination by the administrator is delayed two years.

Inherent in the Trial Court's determination as to the first and third causes of action herein is the finding, in accordance with the decision in *Southeastern Oil Florida, Inc.* (*supra*), that the appeal procedure herein was futile by reason of inaction by the Commissioners for over two years relative

to the appeals taken. It denied recovery on the first cause of action solely by reason of failure to give notice of delay within ten days of the commencement thereof (App. pp. 28a-29a). It granted judgment on the third cause of action (App. 36a), which it could not have done except for a finding that appeal procedure was futile, since the District defended on the ground that the appeal procedure had not been exhausted (App. pp. 21a, 22a, 23a).

The District of Columbia Code limits the jurisdiction of the Commissioners to $10,000

Even under the *Blair* case, petitioner was not required to exhaust the administrative remedy of appeal to the Commissioners of the District of Columbia since the Commissioners had no authority to entertain a claim in excess of $10,000 and the appeal would have been futile. Since the District of Columbia was not a party in the *Blair* case, the question as to the requirement for administrative appeal to the Commissioners, as affected by the statutory limitation of their authority, could not have been and was not presented or argued. The District of Columbia Code expressly limits the authority of the Commissioners of the District of Columbia to settlement of claims not in excess of $10,000.

Title 1, Sec. 902, District of Columbia Code, 1951 Ed. (Act of June 5, 1930, 46 Stat. 500, c. 400, Act of Feb. 11, 1929, 45 Stat. 1160, c. 173 Sec. 1) entitled, "Settlement of Claims and Suits against District of Columbia—cases that may be settled—defenses," provides that the Commissioners are empowered to settle claims and suits when the cause of action (a) arises out of negligence or wrongful act, and (b) arises out of facts and circumstances which place the claim within doctrines and principles of law decided by the courts of the District or Supreme Court to be controlling in the District of Columbia. An action for breach of contract would come under (b). Section 904 limits the authority of the Commissioners to settle "any claim or cause of action" not in excess of $10,000.00.

The district, may not, by its contracts, impose a greater authority upon the Commissioners than the statute allows.

The Court of Appeals held that the fact that the Commissioners are limited in amount which can be granted in settlement is immaterial to whether the appeal to them is required and that had the procedure under Article 15 been followed and the appeal to the Commissioners taken, "it is entirely possible that the damages to the petitioner would have been substantially lessened."

The statutory limitation of authority, however, to *settlements* not exceeding $10,000. necessarily carries with it a limitation of jurisdiction to *entertain* a claim in excess of that amount.

The Court of Claims has held that where on an administrative appeal, if the administrative agency would not have jurisdiction to grant an award of damages sustained, it would not have jurisdiction for any purpose.

Anthony P. Miller v. *U. S.*, 111 Ct. Cls. 252, 330, 77 Fed. Supp. 209 (1948).

It may be assumed that if an appeal had been taken, the Commissioners would have found, as the trial court did find, that the petitioner had sustained damages to the extent of $45,649.57. Since the Commissioners had no authority to direct payment for that amount, the petitioner would then have been compelled to institute suit in any event to recover the same.

There is therefore a conflict of decision between the Court of Claims and the Court of Appeals herein which held that the fact that the Commissioners are limited in amount which they may grant in settlement is immaterial whether the appeal to them is required.

The decision of the trial court, as affirmed by the Court of Appeals, that petitioner was barred from recovery on the second cause of action by reason of the failure to take an

administrative appeal was erroneous and petitioner should recover the sum of $45,659.47 found to be its damages for the breach of contract by the respondent in requiring the petitioner to perform work beyond the requirements of the contract.

Jurisdiction in the United States District Court for the District of Columbia

Jurisdiction of the United States District Court for the District of Columbia was invoked under Section 11-306 of the Code of the District of Columbia providing for suits in the said Court on claims against the District.

Amplification of Reasons Relied on for Allowance of Writ

I. The decision of this Court in *United States* v. *Blair*, 321 U. S. 730 (1944), should be reconsidered in the light of the failure to present to this Court in that case the questions with respect to the nature of claims for breach of contract as being *dehors* the contract and not "under" the contract as provided in Article 15, and therefore not subject to administrative appeal and with respect to the absence of statutory authority of administrative agencies to entertain unliquidated claims for damages for breach of contract.

This Court should clarify and settle the confused situation now existing with respect to administrative appeals on unliquidated claims for damages for breach of contract created by its decision in the *Blair* case, in view of the fact that notwithstanding such decision, the United States Court of Claims and the administrative agencies have continued to hold that administrative appeals on such claims are unauthorized by statute and are not appealable and that the failure to prosecute administrative appeals on such claims does not bar recovery thereon.

II. The decision of the Court of Appeals is in conflict with decisions of the United States Court of Claims and of administrative agencies on the following matters:

(1) Notice of the causes of delay is not required where such delay results from breaches of contract on the part of the Government.

(2) No liquidated damages may be imposed for delays due to the fault of the contractor where such delays are concurrent with delays due to the fault of the Government.

(3) No liquidated damages may be imposed where separate units are required to be constructed and one or more of the units is completed within the contract time where the contract provides for no apportionment of liquidated damages with respect to the separate units.

(4) Where extra work is ordered by the Government and the same cannot be completed within the contract time due to shortage of materials, the contractor is entitled to an extension of time for the completion of the entire contract to the date of completion of the extra work and no liquidated damages may be imposed for any delay prior thereto.

(5) No administrative appeal is required on unliquidated claims for damages for breach of contract as a condition precedent to instituting of action therefor.

(6) The administrative agencies have no statutory authority to entertain appeals on unliquidated claims.

(7) A claim for damages for breach of contract in requiring the contractor to perform work beyond the requirements of the contract is not a question arising "under" a contract but is *dehors* the contract and not within Article 15 requiring administrative appeal.

(8) Where the administrative agency has no authority to award damages claimed, it has no authority to entertain the claim.

III. The Court of Appeals also failed to properly apply the decision of this Court in *United States* v. *Blair*, 321 U. S. 730, in failing to hold on the second cause of action that appeal to the Commissioners of the District of Columbia would have been futile by reason of the absence of statutory authority of the Commissioners to entertain such appeal, and in holding that the petitioner was barred from recovery by reason of the failure of petitioner to take such appeal.

IV. The Court of Appeals also adopted the determination of the trial court that Article 15 of the standard form of government construction contract requires not only that notice of the causes of delay be given within ten days from the date of the commencement thereof but that application for an extension of time must also be made within that period. No such ruling has been made by any other court. This Court should consider such question and determine whether such application for an extension of time within the ten-day period is required by Article 15 of the standard form of government construction contract.

Each of the above matters involves important questions of Federal Law in the administration of government construction contracts which should be settled by this Court. They affect the rights of contractors and the authority of administrative agencies on appeals in contract cases. Contractors on government work should be in a position to know their rights and obligations, free from any conflict of decision between the various courts having jurisdiction of claims against the government or its subsidiaries, such as the District of Columbia. Likewise, administrative agencies should be in a position to apply *established* law with respect to their authority in the administration of construction contracts, free from any doubt resulting from conflict in judicial decisions.

CONCLUSION

We submit that in the public interest, this Court should review the judgment of the United States Court of Appeals with respect to the rights of contractors and authority of administrative agencies on government construction contracts and that a Writ of Certiorari be granted.

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Certificate of Service

I, EMANUEL HARRIS, counsel for petitioner in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 19th day of September, 1958, I served copies of the foregoing petition for a writ of certiorari on the District of Columbia, Respondent, by causing copies thereof to be mailed in a duly addressed envelope, with postage prepaid, to Chester H. Gray, Corporation Counsel, District of Columbia, the attorney for the Respondent.

Dated, September 19th, 1958.

Emanuel Harris

EMANUEL HARRIS,
Counsel for Petitioner.

APPENDIX "A"

Opinion by Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14107

PROGRESSIVE BUILDERS, INC., APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

No. 14108

DISTRICT OF COLUMBIA, APPELLANT

v.

PROGRESSIVE BUILDERS, INC., APPELLEE

Appeals from the United States District Court
for the District of Columbia

Decided June 26, 1958

Mr. Max E. Greenberg, with whom *Mr. Bernard J. Gallagher* was on the brief, for appellant in No. 14107 and appellee in No. 14108.

Mr. Hubert B. Pair, Assistant Corporation Counsel for the District of Columbia, with whom *Mr. Chester H. Gray*, Corporation Counsel, *Mr. Milton D. Korman*, Principal Assistant Corporation Counsel, and *Mr. Oscar P. Mast*, Assistant Corporation Counsel, were on the brief, for appellee in No. 14107 and appellant in No. 14108. *Messrs.*

Richard W. Barton and *George D. O'Brien*, Assistant Corporation Counsel, also entered appearances for appellee in No. 14107 and appellant in No. 14108.

Before REED, Associate Justice of the Supreme Court, retired,[1] and PRETTYMAN and FAHY, Circuit Judges.

PRETTYMAN, *Circuit Judge:* This is an appeal by Progressive Builders, Inc., and a cross-appeal by the District of Columbia municipal government from a judgment of the District Court in an action for breach of contract. Progressive contracted to build for the District four preliminary sedimentation tanks and four sludge digestion tanks, together with related facilities.

Progressive stated three separate causes of action. The first was for $30,600, representing an amount deducted by the District for liquidated damages. The contract provided that for each day of delay in completion of the work the contractor would be liable in the amount of $100.

The trial court found that the extended completion date was May 3, 1951, and that Progressive was responsible for delay from May 3 to August 22, 1951. It further found that the District was primarily responsible for delay from August 23, 1951, to March 4, 1952, the date when the work was accepted, and that Progressive would have been entitled to recover the retained liquidated damages for such latter period of delay except for its failure to give notice of such delay within ten days of the commencement thereof. The court held that notice of the delay was a condition precedent to recovery.

Article 9 of the contract, the provision requiring notice of delay, is specific. It states that the contractor shall not be charged with liquidated damages "if the contractor shall within ten (10) days from the beginning of any such delay (unless the contracting officer, with the approval of the Commissioners shall grant a further period of time prior

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[1] Sitting by designation pursuant to the provisions of Sec. 294(a), Title 28, U. S. Code.

to the date of final settlement of the contract) notify the contracting officer in writing of the causes of delay". We agree with the trial court that *United States* v. *Cunningham* [2] is controlling on the issue whether Article 9 imposes a condition precedent to recovery. The question in that case was whether oral notice met the requirement of a provision similar to Article 9. Having held that oral notice did not comply with the provision, this court reversed the trial court, holding that the contractor was not entitled to damages resulting from delays attributable to the United States, the failure to give written notice being fatal to such recovery. The court discussed the purpose of the provision—"Obviously, the intent of this provision is to inform the government of the cause of delay and afford an opportunity to remove it, and likewise to warn the government of the intention of the contractor to insist upon it as a means of prolonging the stipulated time for completion of the work." [3]

Progressive says that it makes no difference whether notice was given, because this contract was severable, and where a contract is severable liquidated damages must be apportioned to the severable parts; that if there is no apportionment the liquidated damages provision fails and only such actual damages as the District can prove may be exacted. The reasoning behind Progressive's argument is that, where a contract contains several covenants and a single sum is named for damages for any breach, such named sum may be grossly disproportionate to the probable damages from the breach. In such a contract the entire provision as to liquidated damages falls and actual damages only may be recovered. We do not have such a contract here. The work here was divided into two units; $100 damages per day as to each unit would not be unreasonable.[4] Where the amount

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[2] 75 U.S. App. D.C. 95, 125 F.2d 28 (D.C.Cir. 1941).

[3] *Id.* at 97, 125 F.2d at 30.

[4] Progressive's counsel stated on oral argument that the total contract price was in excess of one million dollars.

made payable would not be held to be a penalty if it were made payable for breach of each of the undertakings, standing alone, the liquidated damages provision is good. Williston points to "the difficulty of laying down any narrower test than the reasonableness in each particular case of the sum agreed upon as compensation for the breach."[5] In the circumstances of this case we believe the liquidated damages provision here involved is valid.

With regard to the second cause of action the trial court found that Progressive had been damaged to the extent of $45,649.57 as a result of breaches by the District. The court held, however, that Progressive was barred from recovery of the damages, because it did not proceed in accordance with the requirements of Article 15 of the contract. Article 15 provides:

> "Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Commissioners, whose decision shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed."

In its opinion the trial court said: "It is conceded that the plaintiff did not proceed in accordance with the requirements of the above quoted Article [Article 15] * * *."

We agree with the trial court that a contractor who has not exhausted his administrative remedies is barred by *United States v. Blair*[6] from pursuing his cause of action at law. In *Blair* the suit was for damages for extra labor and materials, excess wages, and miscellaneous costs found to be the result of unauthorized acts and grossly erroneous instructions on the part of Government employees. The pertinent provisions of the contract in that case were iden-

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[5] 3 WILLISTON, CONTRACTS 2214 (Rev. ed. 1936).

[6] 321 U.S. 730, 88 L.Ed. 1039, 64 S.Ct. 820 (1944).

tical with Article 15 involved here. The Court clearly explained its reasons for denying recovery:

> "In Article 15 the parties clearly set forth an administrative procedure for respondent to follow. Such a procedure provided a complete and reasonable means of correcting the abuses alleged to exist in this case. Arbitrary rulings and actions of subordinate officers are often adjusted most easily and satisfactory by their superiors. Furthermore, Article 15 provided the Government with an opportunity to mitigate or avoid damages by correcting errors or excesses of its subordinate officers. Having accepted and agreed to these provisions, respondent was not free to disregard them without due cause, accumulate large damages and then sue for recovery in the Court of Claims. Nor can the Government be so easily deprived of the benefits of the administrative machinery it has created to adjudicate disputes and to avoid large damage claims." [7]

Progressive says it would have been futile to pursue the administrative remedy, because (1) the contracting officer had clearly indicated his views on the matter involved and (2) the Commissioners are expressly limited by law [8] to settlements not exceeding $10,000.

Since under *Blair* an appeal to the contracting officer in case of a dispute is clearly required, Progressive's first point is not well taken; and the fact that the Commissioners are limited in the amount which they may grant in settlement is immaterial to whether the appeal to them is required. Article 15 of the contract affords the Commissioners an opportunity to reduce the potential liability of the District and creates machinery for redress of contractors' grievances. There is no showing by Progressive that, had the appeal been taken, the Commissioners would necessarily have affirmed the ruling of the contracting officer. Had the pro-

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[7] *Id.*, 321 U.S. at 735.

[8] 65 STAT. 131 (1951), D.C. CODE § 1-904 (1951 ed., Supp. VI).

cedure under Article 15 been followed, it is entirely possible that the damages to Progressive would have been substantially lessened.

Progressive's third cause of action was for $6,620, representing the value of extra concrete installed by Progressive at the direction of the District. We agree with the trial court that Progressive was entitled to be paid for this concrete under the terms of the contract.

Affirmed.

APPENDIX "B"

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14107

PROGRESSIVE BUILDERS, INC., APPELLANT

v.

DISTRICT OF COLUMBIA, APPELLEE

April Term, 1958

C. A. 4159-54

United States Court of Appeals for the District of Columbia Circuit

FILED Jun 26, 1958

Joseph W. Stewart

No. 14108

DISTRICT OF COLUMBIA, APPELLANT

v.

PROGRESSIVE BUILDERS, INC., APPELLEE

April Term, 1958

C. A. 3159-54

Appeals from the United States District Court for the District of Columbia

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Before: REED, Associate Justice of the Supreme Court, Retired, and PRETTYMAN and FAHY, Circuit Judges.

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said District Court appealed from in these cases be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party bear the costs of its own briefs and docket fee and that two-thirds of the cost of printing the joint appendix in these cases be borne by Progressive Builders, Inc., and that one-third the cost of printing the joint appendix be borne by the District of Columbia.

Dated: Jun 26, 1958.

Per Circuit Judge Prettyman.

APPENDIX "C"

Statutes Involved

1. Act of Congress (U.S.C. Title 31, Sec. 665(a); R.S. Sec. 3679; March 3, 1905, c. 1484, Sec. 4, 33 Stat. 1257; amended Feb. 27, 1906, c. 510, Sec. 3; 34 Stat. 48; amended Sept. 6, 1950, c. 896, subchap. VII, Sec. 1211, 64 Stat. 765; amended Aug. 1, 1956, c. 814, Sec. 3; 70 Stat. 784; amended Aug. 28, 1957, P.L. 85-170, subc. XIV, Sec. 1401, 71 Stat. 440.

> "Expenditures in excess of appropriations—Voluntary service forbidden—Apportionment of appropriations for contingent expenses or other general purposes.—(a) No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance, of appropriations made for such purpose unless such contract or obligation is authorized by law."

2. Act of Congress, U.S.C. Title 31, Sec. 71; R.S. Sec. 236, June 10, 1921, c. 8, Sec. 305, 42 Stat. 24.

> "Public accounts to be settled in General Accounting Office.—All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

3. Act of Congress, U.S.C. Title 41, Sec. 11; R.S. Sec. 3732; June 12, 1906, c. 3078, 34 Stat. 255.

> "No contracts or purchases unless authorized or under adequate appropriation.—No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation

adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

4. Act of Congress, U.S.C. Title 41, Sec. 12; R.S. Sec. 3733.

"No contract to exceed appropriation.—No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

5. District of Columbia Code, Title 47, Sec. 105 (1951 Ed.); Act of June 26, 1912, 37 Stat. 184, c. 182, Sec. 9.

"The provisions of Section 665 of Title 31 of the Code of Laws of the United States of America, known as the 'Anti-Deficiency Act', are hereby extended and made applicable in all respects to appropriations made for and expenditures of and to all of the officers and employees of the Government of the District of Columbia."

6. District of Columbia Code, Title 1, Sec. 902 and Sec. 904 (1951 Ed.); Act of Feb. 11, 1929, 45 Stat. 1160, c. 173, Sec. 1; Act of June 5, 1930, 46 Stat. 500, c. 400.

"Sec. 1-902 (20-103). Settlement of claims and suits against the District of Columbia—Cases that may be settled—Defenses.

The Commissioners of the District of Columbia are empowered to settle, in their discretion, claims and suits, either at law or in equity, against the District of Columbia whenever the cause of action—

(a) Arises out of the negligence or wrongful act, either of commission or omission, of any officer or employee of the District of Columbia, for whose negligence or acts the District of Columbia, if a private individual, would be liable prima facie to respond in damages, irrespective of whether such negligence occurred or such acts were done in the performance of a municipal

or governmental function of said District: Provided, *however*, That nothing herein contained shall be construed as depriving the District of Columbia of any defense it may have to any suit, either at law or in equity, which may be instituted against it or to give any person, corporation, partnership or association any right to institute any suit against the District of Columbia which did not exist prior to June 5, 1930 (emphasis theirs).

(b) Arises out of the existence of facts and circumstances which place the claim or suit within the doctrines and principles of law decided by the courts of the District of Columbia or by the Supreme Court of the United States to be controlling in the District of Columbia. (Feb. 11, 1929, 45 Stat. 1160, ch. 173, Sec. 1; June 5, 1930, 46 Stat. 500, ch. 400.)

Sec. 1-904 (20:105). Settlements limited to $10,000. Report to Congress—Appropriations authorized.

No settlement of any claim or cause of action herein authorized by sections 1-902 to 1-905 to be made by the commissioners of the District of Columbia shall in any event exceed the sum of $10,000, and all settlements entered into by the Commissioners of the District of Columbia acting under the terms and provisions of sections 1-902 to 1-905 shall be presented to the Congress, together with a brief statement of the nature of the claim or suit, the amount claimed, and the amount of the settlement, with a summary of the evidence and circumstances under which the settlement was made. Appropriations for the payment of such settlements are hereby authorized, payment thereof to be made in the same manner as are other expenditures for the District of Columbia. (As amended July 31, 1951, 65 Stat. 131, ch. 274, Sec. 1.)